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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

♦ ♦ ♦

RONALD N. SIMON,
Petitioner,

versus

JOHN COOK, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, AND THE LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT,
Respondents.

♦ ♦ ♦

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

♦ ♦ ♦

PETITION FOR A WRIT OF CERTIORARI

♦ ♦ ♦

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QUESTIONS PRESENTED

1. Whether, under the Fourth Amendment, a police officer may force an individual believed to have a mental illness to undergo a warrantless mental-health evaluation based on nothing more than "a probability or substantial chance of dangerous behavior" under the circumstances of which the officer was aware at the time of the seizure?

2. Whether Kentucky's statute authorizing a warrantless mental-health evaluation when a police officer has "reasonable grounds to believe that an individual is mentally ill and presents a danger or threat of danger" is vague and overbroad in violation of the First, Fourth and Fourteenth Amendments?

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PETITION FOR WRIT OF CERTIORARI

Ronald N. Simon, *pro se*, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit for review of the decision of that Court which upheld the constitutionality of Kentucky's statutes providing for warrantless mental-health evaluations and which applied a probable cause standard requiring only a "probability or substantial chance of dangerous behavior" under the circumstances.

OPINIONS BELOW

The Order of the Court of Appeals denying the petitioner's "Petition for Rehearing and Suggestion for Rehearing En Banc" is not reported. Petitioner's Appendix ("Pet. App.") A. The opinion of the Court of Appeals is reported as *Simon v. Cook*, 261 Fed. App'x. 873 (6th Cir. 2008). Pet. App. B. The opinions and orders of the United States District Court for the Eastern District of Kentucky in *Simon v. Cook*, Case No. 04-489, are not reported. Pet. App. C-G

JURISDICTION

The opinion of the Court of Appeals was entered on January 30, 2008. Pet. App. B. The Court of Appeals denied petitioner's "Petition for Rehearing and Suggestion for Rehearing En Banc" on June 6, 2008. Pet. App. A. Petitioner filed this petition for a writ of certiorari within 90 days of the

order denying rehearing. This Court has jurisdiction of this appeal based on 28 U.S.C. § 1254 (1).

Because this proceeding draws into question the constitutionality of state statutes, 28 U.S.C. § 2403 (b) may apply. The Court of Appeals did not certify any constitutional issues in this case. The notifications required by Supreme Court Rule 29.4 (c) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

Kentucky Revised Statute § 202A.041 is titled "Warrantless arrest and subsequent proceedings" and provides in full:

(1) Any peace officer who has reasonable grounds to believe that an individual is mentally ill and presents a danger or threat of danger to self, family, or others if not restrained shall take the individual into custody and transport the individual without unnecessary delay to a hospital or psychiatric facility designated by the cabinet for the purpose of an evaluation to be conducted by a qualified mental health professional. Upon transport of the person to the hospital or psychiatric facility, the peace officer shall provide written documentation which describes the behavior of the person which caused the peace officer to take the person into custody. If, after evaluation, the qualified mental health professional finds that the person does not meet the criteria for involuntary hospitalization, the person shall be released immediately and transported back to the person's home county by an appropriate means of transportation as provided in KRS 202A.101. If, after evaluation, the qualified mental health professional finds that the person meets the criteria for involuntary hospitalization, appropriate proceedings under this chapter shall be initiated. The person may be held pending certification by a qualified mental health professional and implementation of procedures as provided in K.R.S.

> 202A.028, 202A.031, or 202A.051 for a period not to exceed eighteen (18) hours.
>
> (2) If, after the evaluation, the qualified mental health professional finds that the person does not meet the criteria for involuntary hospitalization and the peace officer has probable cause to believe that the person has committed a criminal offense, the peace officer may swear out a warrant and take the arrested person without unnecessary delay before a judge.

KEN. REV. STAT. ANN. § 202A.041 (West 2008).

The Kentucky statute's definitional section defines a "mentally ill person" as

> "a person with substantially impaired capacity to use self-control, judgment, or discretion in the conduct of the person's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors."

KEN. REV. STAT. ANN. § 202A.011 (9) (West 2008).

The Kentucky statute's definitional section defines "danger" or "threat of danger to self, family, or others" as

> "substantial physical harm or threat of substantial physical harm upon self, family, or others, including actions which deprive self, family, or others of the basic means of survival including provision for reasonable shelter, food, or clothing."

KEN. REV. STAT. ANN. § 202A.011 (2) (West 2008).

STATEMENT OF THE CASE

1. Overview. On October 31, 2003, John Cook, a police officer, seized Ronald N. Simon, a forty-one-year-old attorney, on the front porch of Simon's home, transported Simon in handcuffs to a psychiatric hospital, and forced Simon, without a warrant or a court order, to undergo a mental-health evaluation. The psychiatric hospital held Simon against his will for five days and released him on November 5, 2003, the day after Kentucky's gubernatorial election.

Cook seized Simon pursuant to an official policy implementing Kentucky Revised Statute § 202A.041 which authorizes warrantless mental-health evaluations when a police officer has "reasonable grounds to believe that an individual is mentally ill and presents a danger or threat of danger . . . if not restrained . . . ."

Simon sued Cook and Cook's employer, the Lexington Fayette Urban County Government (LFUCG), under 42 U.S.C. § 1983 and challenged the constitutionality of the Kentucky statute under the

First, Fourth and Fourteenth Amendments. The lawsuit presented a federal question, and the United States District Court for the Eastern District of Kentucky exercised subject-matter jurisdiction pursuant to 28 U.S.C. § 1331.

The district court granted summary judgment for Cook and the LFUCG based on qualified immunity, and rejected Simon's challenges to the statutes. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed. The Sixth Circuit denied without discussion a petition for rehearing and suggestion for rehearing *en banc*.

In addition to claims under the Fourth Amendment, Count X of Simon's Amended Complaint alleges the Kentucky statute is vague and overbroad and requests all appropriate relief. Simon did not, however, make a detailed argument under the First Amendment in the district court, and the Sixth Circuit declined to address Simon's First Amendment arguments presented in full for the first time on appeal. Pet. App. B at 24-26.

2. Undisputed Facts. The parties' factual allegations are in marked conflict. Pet. App. B at 5-8. The Sixth Circuit relied on the following undisputed facts: On October 31, 2003, a Friday, Simon reported to the LFUCG police department that a coroner's van had been following him. Cook and another LFUCG police officer came to Simon's home in response to Simon's complaint regarding the coroner's van. Simon was neatly dressed and well groomed and did not initially seem dangerous. Simon made statements to Cook that indicated Simon believed various unknown government officials might be harassing him and that the police had followed and assaulted him in the past. Cook

knew from a LFUCG police bulletin that Simon had followed another police officer when Simon believed he saw the officer following him. Cook refused to take Simon's complaint and referred him to other agencies. Simon may have asked rhetorically, "How would you like it if I followed you around?" which Cook interpreted as a threat. The situation escalated somewhat in intensity. Simon pointed his index finger within a foot of Cook's face. Cook grabbed Simon's wrist and handcuffed Simon. Simon did not resist and cooperated. Cook did not charge Simon with a criminal offense. The second officer testified in his deposition that Simon's finger-pointing was threatening. Simon's neighbor saw Cook put Simon, handcuffed, into the back seat of Cook's marked LFUCG police cruiser. Cook drove Simon to a psychiatric hospital. A second-year medical resident certified Simon for involuntary admission to the hospital. The second-year medical resident relied on Cook's written statement which alleged the basis for the seizure. The hospital immediately released Simon after a statutorily required period of 72 hours excluding weekends. Pet. App. B at 9-11, 17-19.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE

The Sixth Circuit's probable cause analysis in the mental-health evaluation context is contrary to this Court's Fourth Amendment jurisprudence. In the absence of exigent circumstances or criminal activity, a showing of probable cause for a mental-

health evaluation based only on a "probability or substantial chance of dangerous behavior" under the circumstances is not reasonable.

The Court has addressed similar Fourth Amendment questions in *Wyoming v. Houghton* , 526 U.S. 295 (1999) (allowing search of automobile passenger's belongings) and *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (allowing warrantless arrest for misdemeanor).

In *Wyoming* and *Atwater*, the Court first looked to founding-era common law to determine the reasonableness of a search or seizure. *Atwater*, 532 U.S., at 326-27. The Court also considered traditional standards of reasonableness and balanced, on the one hand, the rights of the individual against, on the other, the legitimate interests of the state. *Atwater* at 346; *Wyoming*, 526 U.S., at 299-300.

1. **Sixth Circuit Standard.** In this case, the Sixth Circuit applied the probable cause standard as articulated in *Monday v. Oullette*, 118 F. 3d 1099 (6th Cir. 1997). The *Monday* court analogized a dangerous mental condition to the role of criminal activity in traditional Fourth Amendment analysis and concluded that a showing of probable cause in the mental-health seizure context requires "only a 'probability or substantial chance' of dangerous behavior, not an actual showing of such behavior." 118 F. 3d, at 1102 (quoting *Illinois v. Gates*, 462 U.S. 213, 245 n.13 (1983)).

Monday draws no analytical distinction between the initial seizure and the subsequent evaluation. Probable cause to seize is also probable cause to compel an evaluation. Pet. App. B at 21-22. A seizure under the Kentucky statute thus entails

not just an inconvenient period of detention lasting up to eighteen hours, but also a massive, traumatic and humiliating invasion of privacy. *Cf. Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 618 (1989) (involuntary urinalysis entailed search *and* seizure).

2. Lack of clarity in the law. The United States circuit courts that have examined the issue agree that the Fourth Amendment requires a police officer to have probable cause before he or she may seize an individual for a mental-health evaluation. *See Fisher v. Harden*, 398 F. 3d 837, 847 (6th Cir. 2005) (collecting cases). State statutes uniformly require some level of "dangerousness" to self or others before an officer may make a seizure,[1] and the United States circuit courts have typically considered whether the officer complied with the relevant state statute as a part of the summary judgment / qualified immunity / probable cause analysis. *See, e.g., Maag v. Wessler*, 960 F. 2d 773, 776 (9th Cir. 1991) (applying Montana statute).

Despite the general agreement among the circuit courts regarding the need for probable cause, there is a lack of clarity regarding the particularity necessary for a showing of a "clearly established" right in this context. *Compare Bias v. Moynihan*, 508 F. 3d 1212, 1220 (9th Cir. 2007) (citing *Maag v. Wessler* as authority putting officers on notice of a clearly established right) *with S.P. v. City of Takoma Park, Md.*, 134 F. 3d 260, 267 n.4 (4th Cir. 1998) (citing *Maag v. Wessler* as authority lacking in the

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[1] *E.g.*, Georgia requires a penal offense. GA. CODE ANN. § 37-3-42 (a) (1) (1995). Pennsylvania requires an "overt act" when suicide or mutilation is alleged. 55 PA. CODE § 5100.84 (g) (1)(2008).

particularity necessary to put officers on notice of a clearly established right).

The Fourth Circuit addressed the lack of clarity in the law:

> We are aware of no cases that define "dangerousness" with the requisite particularity or explain what type or amount of evidence would be constitutionally sufficient to establish probable cause of a dangerous condition. . . . Certainly the concept of "dangerousness" which calls on lay police to make a psychological judgment is far more elusive than the question of whether there is probable cause to believe someone has in fact committed a crime. The lack of clarity in the law governing seizures for psychological evaluations is striking when compared to the standards detailed in other Fourth Amendment contexts, where probable cause to suspect criminal misconduct has been painstakingly defined.

Gooden v. Howard County, Md., 954 F. 2d 960, 968 (4th Cir. 1992) (en banc) (allowing defense of qualified immunity because right to be free from unreasonable seizures for mental-health evaluation was not clearly established with sufficient factual particularity); *but see Bailey v. Kennedy*, 349 F. 3d 731, 741 (4th Cir. 2003) (noting lack of clarity in the law, but denying defense of qualified immunity because it would have been sufficiently clear to an objectively reasonable

officer, and therefore clearly established, that a 911 report, without more, is not probable cause for a mental-health seizure).

There have been several federal decisions denying qualified immunity in this context since *Gooden*, but the Fourth Circuit's criticism still has persuasive force. Loosed from the tether of state statutory language, the concept of "dangerousness" becomes almost absurdly subjective. There is a probability of danger in even the safest of activities. One need not be an actuary to fashion numerous plausible hypothetical examples.

In this case, it is undisputed that Simon pointed his index finger in Cook's face. It is also undisputed that Cook did not cite Simon for a criminal offense. The Court of Appeals observed that "mere finger-pointing presents a very low level of dangerousness," and expressed a reluctance "to set the bar for probable cause so low that the merely obnoxious are detained for mental evaluation." Pet. App. B at 18. Despite this, the Court also considered Simon's "apparently paranoid statements about the police" and concluded there was a "substantial chance of irrational and dangerous behavior in the near future." *Id.* at 19. That Cook was wrong or was acting in bad faith is beside the point. The question is whether it was reasonable to allow an involuntary mental-health evaluation if Cook perceived only a "probability or substantial chance of dangerous behavior."

2. Common-law rule. Under *Atwater* and *Wyoming*, the Court first looks to the common law when assessing the reasonableness of a search or seizure. *Atwater*, 532 U.S., at 326-27. There is reason to believe the Sixth Circuit's "probability or

substantial chance" standard is contrary to the common law as it stood at the time of the framing of the Constitution.

A founding-era dictum states that anyone may arrest and detain the "furiously mad." *See Brookshaw v. Hopkins*, (1773) Lofft 235, 98 Eng. Rep. 627, 628 (K.B.) ("That there was no warrant from the justice to take up the man; and though not denied, that if a man be furiously mad, the justice, without a warrant, may detain him; this must be on the merits and evidence of the fact, and requires being tried by the country.").

In *Brookshaw*, the plaintiff sued a local magistrate for assault and battery and false imprisonment. After a judgment of nonsuit in the lower court, the issue before the King's Bench was whether the magistrate was acting in his official capacity at the time of the warrantless arrest. The grounds of the arrest were not clear. If the magistrate arrested the plaintiff for a breach of the peace, then he was acting in an official capacity. If he arrested the plaintiff because he was "furiously mad," then he was not acting in an official capacity. The case turned on the issue. Lord Mansfield observed:

> "I owe the great difficulty is, that I cannot decide upon the evidence, whether [the magistrate] committed upon complaint of [a third party], or upon his own view of [the plaintiff's] behaving furiously; or upon his insisting to have his horse to go to the races. . . . On complaint, a justice may commit; but in strict form, the complaint should be

> in writing: on his own view, he may commit without complaint, if he has reason to apprehend the peace will be broken, though not actually broken. The justice, too, ought to have produced witnesses, to show the ground of the commitment. God forbid, too, that a man should be punished for restraining the fury of a lunatic, when that is the case. But if it is so here, [the magistrate] did not act under his office: there is a special power given to two justices."

Brookshaw, 98 Eng. Rep., at 631-2.

Although not entirely clear, the phrase "breach of the peace" was understood in the context of common-law arrest to include at least a threat of violence. *See, e.g.*, MICHAEL DALTON, THE COUNTRY JUSTICE, ch. 3, p. 9 (1727) ("The Breach of th[e] Peace seemeth to be any injurious Force or Violence moved against the Person of another, his Goods, Lands, or other Possessions, whether by threatening words, or by furious Gesture, or Force of the Body, or by any other Force used *in terrorem*"); *but see Atwater*, 532 U.S., at 327 n.2, 333-35 (discussing exceptions to general rule and ancient "divsers statutes").

In his 1775 edition of A DICTIONARY OF THE ENGLISH LANGUAGE, Samuel Johnson defined "furious" as "1. Mad; phrenetick 2. Raging; violent; transported by passion beyond reason. 3. Violent; impetuously agitated." The word "furiously" was defined as "Madly; violently; vehemently." And, the word "mad" was defined as "1. Disordered in the mind; broken in the understanding; distracted;

delirious without fever. 2. Expressing disorder of mind. 3. Over-run with any violent or unreasonable desire: with *on*, *after*, *of*, perhaps better *for*, before the object of desire. 4. Enraged; furious."[2]

Thus, "furiously mad" certainly implies a concomitant breach of the peace. It is also broad enough in meaning to include involuntary actions, such as what might occur during an epileptic or diabetic seizure or the late stages of rabies or syphilis. If we agree that suicide is ultimately a violent act, "furiously mad" might also address such self-immolating overt actions as drinking hemlock or jumping into the river while tied to a millstone.

This understanding of "furiously mad" is born out in state statutory language. A 1788 New York state session law drew a distinction between the "furiously mad," who could be committed to an asylum only upon the authorization of two state officials, and other less dangerous "lunaticks" who were left to the care of family or friends. *See* Act of Feb. 9, 1788, ch. 31, 1788 N.Y. Laws 643, 645. ("An Act for apprehending and punishing disorderly persons"); *see also Lessard v. Schmidt*, 349 F. Supp. 1078, 1084-86 (E.D. Wis. 1972) (citing authoritative scholarship and opining that at common law only the "obviously dangerous" were committed involuntarily).

In sum, at common law, it appears that the Fourth Amendment allowed warrantless seizures of the "furiously mad." Furiously mad implied an imminent breach of the peace. In the context of common-law warrantless arrest, a breach of the peace typically entailed a threat of some specific

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[2] See Table of Authorities, *supra* at vi, for full citation.

measure of violence. Furiously mad also encompassed the threat of involuntary violence and, perhaps, suicide.

Probable cause based only on a "probability or substantial chance of dangerous behavior" falls short of this common-law standard. Not only does "furiously mad" connote a threat of imminent physical violence, it also has a quality of objective obviousness that a "substantial chance of dangerous behavior" does not.

4. Traditional standards of reasonableness. In *Atwater* and *Wyoming*, the Court also considered traditional standards of reasonableness. *Atwater*, 532 U.S., at 346; *Wyoming*, 526 U.S., at 299-300. Traditional standards of reasonableness also argue against *Monday's* "substantial chance of dangerous behavior" standard.

If a full custodial arrest is the quintessential seizure, a seizure for a mental-health evaluation trespasses even further upon individual liberties protected under the Fourth Amendment. *Cf. Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347, 351-53 (1967). Recall that under the Sixth Circuit's probable cause analysis, probable cause to seize is also probable cause to compel a mental-health evaluation. Pet. App. B at 22.

A psychiatrist or psychologist conducting a compelled mental-health evaluation is searching an individual's mind for symptoms of mental illness. A compelled evaluation is thus not unlike a mental strip search. There is little or no physical contact, but an individual must expose themselves to undignified and intrusive interrogation, examination, testing and observation. *See generally* Andrew E. Slaby, M.D., William R. Dubin, M.D. &

David A. Baron, M.S., ED., D.O., *Other Psychiatric Emergencies* in 2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, ch. 29.2, at 2453-70 (Benjamin J. Sadock, M.D. & Virginia A. Sadock, M.D. eds., Lippincott Williams & Wilkins, Eighth Edition 2005)

Not only does an involuntary mental-health evaluation violate an individual's privacy, it is also potentially counterproductive. As the Court observed in another context:

> "Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."

Jaffee v. Redmond, 518 U.S. 1, 10 (1996) (recognizing under F.R.E. 501 a federal, common-law psychotherapist-patient privilege not subject to a balancing of interests or implied waiver). In this case, the Court of Appeals ruled that Simon's lawsuit was an implied waiver of his privilege. Pet. App. B at 30-32.

A compelled mental-health evaluation is thus far more invasive and potentially harmful than the simple prick of a hypodermic needle and the subsequent analysis of one's blood (or DNA). The use of state power to trespass in such a coercive manner deep within the sanctity of one's mind must be seen

as a massive and traumatic molestation of personal privacy.

Certainly, the state has a legitimate interest in public health and public safety in this context. But once a police officer has seized and restrained an individual believed to be dangerous as a result of mental illness, the individual no longer presents a danger to self or others. There may be other exigent circumstances -- such as another dangerous medical condition or a drug overdose -- but, after the initial seizure, there are no exigent circumstances with regard to mental illness. There is no danger of the destruction or spoliation of evidence justifying, for example, a blood test for alcohol metabolites. There is no danger the individual's mental illness will disappear or go away. The state's interests are at their greatest immediately *before* a police officer seizes an individual believed to be dangerous as a result of mental illness.

In *Doby v.DeCrescenzo*, 171 F. 3d 858 (3rd Cir. 1999), the Third Circuit relied on the "special needs" exception to the warrant requirement in the case of an involuntary mental-health evaluation made pursuant to an expert's authorization required by state statute. The *Doby* court did not, however, specifically address the standard applicable when a police officer makes an emergency seizure based only on his or her personal observations without the benefit of expert advice. *Id.* at 871-72. *See also Anthony v. City of New York*, 339 F. 3d 129, 142 (2d Cir. 2003) (finding that blood and urine tests taken after emergency mental-health seizure met the special needs exception to the warrant requirement).

But even if the state can show a "special need" for a warrantless mental-health evaluation, it must

still be reasonable under the Fourth Amendment. *See Skinner*, 489 U.S., at 624.

The Court may find additional guidance in *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891) and in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (unanimous decision).

In *Botsford*, a railroad company sought to compel the medical examination of the plaintiff who was suing the railroad for personal injuries. In upholding the lower court's denial of the request for the examination, the Court wrote: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless *by clear and unquestionable* authority of law." 141 U.S., at 251 (emphasis added).

Papachristou voided a Florida vagrancy ordinance and states: "A direction by the legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster." 405 U.S., at 169. The unanimous Court acknowledged the similarity between the unfettered discretion allowed under the Florida ordinance and the Soviet/Marxist practice of "analogy." *Id.* at 168 n.12.

Taken together, *Botsford* and *Papachristou* are additional authority for the proposition that the individual's interests in privacy, dignity and liberty weigh very heavily against the government's need to compel an emergency mental-health evaluation based on only a "probability or substantial chance of dangerous behavior" under the circumstances.

The Court has addressed "dangerousness" in other contexts, such as federal parole or pretrial detention. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71

(1992) (allowing release of potentially dangerous acquitee found not guilty by reason of insanity); *United States v. Salerno*, 481 U.S. 739, 748-49 (1987) (upholding federal statute providing for pretrial detention based on "future dangerousness"). These decisions do not address involuntary mental-health evaluations *per se* and are readily distinguished from the instant case. An allegedly dangerous criminal offender or institutionalized acquitee or detainee is not entitled to the same expectation of privacy, dignity and liberty as an otherwise free citizen standing on the front porch of his own home.

And, although the Court has held that a constitutional challenge to a search or seizure under Section 1983 must be analyzed under the Fourth Amendment, it must be said that, under the Court's First Amendment jurisprudence, the freedom of expression has traditionally embraced and indeed celebrated our culture's overlapping public displays of nonconformity, idiosyncratic behavior, vigorous political dissent and religious ecstasy. *See, e.g., Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis J., concurring) ("Only an emergency can justify repression.").

5. Practical realities and ease of administration.

In addition to founding-era common law and traditional standards of reasonableness, the Court has also considered the "practical realities" facing a police officer in the field as a part of its assessment of the reasonableness of a search or seizure. *Wyoming*, 526 U.S., at 306. A balancing of interests must be conducted with an eye to the generality of cases. *Id.* at 305.

In this context, probable cause based on a "substantial chance of dangerous behavior" is not reasonable in light of the practical realities a police officer faces in the field. As the Fourth Circuit observed in *Gooden*, dangerousness is not a static quality. The chance that an individual will engage in dangerous behavior becomes more "substantial" as the level of the potential harm increases. *See generally Villanova v. Abrams*, 972 F. 2d 792, 796 (7th Cir. 1992) (analogizing test for dangerousness to test for negligence at common law).

Neither Cook nor the Court of Appeals ever specified what Simon's future "dangerous behavior" might be. One logical inference is that Simon might have followed a police officer and engaged in more finger-pointing. Another is that Simon might have poked Cook in the eye. The invitation to speculate is endless, and there will always be a level at which even a remote chance of catastrophic harm becomes "substantial."

A police officer in the field cannot hope to engage in such a speculative, multi-part balancing analysis in the heat of the moment. The Court has stated: "We have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater*, 532 U.S., at 347.

Rather than engage in such an analysis, a prudent police officer will seize a despondent or obnoxious individual in circumstances that serve no legitimate government interest. The Sixth Circuit's probable cause standard thus creates an incentive to

seize non-dangerous individuals and, arguably, in certain circumstances, creates a presumption of insanity.

In stark contrast is the medical reality. By far, the most significant "practical reality" in this context is the statistical rarity of violent mental illness. Authoritative medical texts confirm that the vast majority of people with a mental illness are not violent. *See* John Monahan & Jean Arnold, *Violence by People with Mental Illness: A Consensus Statement by Advocates and Researchers*, 19 PSYCHIATRIC REHABILITATION J. 67, 70 (1996) ("Serious violence by people with major mental disorders appears concentrated in a small fraction of the total number, and especially in those who use alcohol and drugs. Mental disorders -- in sharp contrast to alcohol and drug abuse -- account for a miniscule portion of the violence that afflicts American society.").

To be sure, mental-health care is an important public welfare issue, but it is not one for the police to resolve on a case-by-case basis. Police officers in the field are not equipped and cannot be expected to make what should ultimately be a public policy decision. Under our system of ordered liberty, the health care available to non-dangerous individuals with a mental illness is a matter for the legislative process.

6. A clear and simple rule.

Given the rarity of violent mental illness, a reasonable balancing of interests should favor the rights of the individual in this context. In the absence of exigent circumstances or criminal activity, the dangerousness necessary for a mental-health evaluation should be *obvious* or *foreseeable* to an

objectively reasonable police officer. In this case, it was neither foreseeable nor obvious that Simon was dangerous.

Not only is a bright-line, probable-cause standard requiring "obvious dangerousness" easier to administer in the field, it also better reflects historical and traditional standards of reasonableness and free expression in this context. Qualified immunity would still protect all but the plainly incompetent, and the trier of fact would determine the ultimate issue of dangerousness in those few cases challenged in court.

A related and more difficult question not necessarily presented in this petition is what the First or Fourth Amendment allows when there is only a reasonable suspicion of a dangerous mental illness. *See, e.g., State v. Diloreto*, 180 N.J. 264, 850 A. 2d 1226 (2004) (applying "community caretaker doctrine" to allow police to exceed field inquiry's level of intrusiveness when investigating a missing person report); see *also United States v. Garner*, 416 F. 3d 1208 (10th Cir. 2005) (extending "community caretaker doctrine" beyond automobile context when investigating an unconscious pedestrian); *but see Fisher v. Harden*, 398 F. 3d 837, 851-52 (6th Cir. 2005) (Gibbons, J., dissenting) (applying *Terry v. Ohio* when responding to 911 report of attempted suicide).

And, it merits mentioning that diabetic shock arises repeatedly in the facts of many decisions involving claims under Section 1983 against police officers. *See, e.g., Graham v. Conner*, 490 U.S. 386 (1989) (requiring that excessive force claims be analyzed under the Fourth Amendment).

II. THE SIXTH CIRCUIT'S DECISION PRESENTS AN IMPORTANT QUESTION UNDER THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS

The Kentucky statutes are void for vagueness and overly broad in violation of the First, Fourth and Fourteenth Amendments. The Kentucky statutes do not provide police officers with precise standards, and they chill political speech and the speech of whistleblowers and other third parties who might allege improper or illegal surveillance. *See City of Chicago v. Morales*, 527 U.S. 41, 70-73 (1999) (Breyer J., concurring) (every application of anti-gang loitering ordinance was an exercise of unlimited discretion); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973) (voiding facially overbroad statute regulating political activity of state civil servants); *Coates v. City of Cincinnati*, 402 U.S. 611, 614-16 (1971) (voiding facially vague and overbroad statute criminalizing "annoying" behavior in public).

Under the Kentucky statutes, individuals subjected to improper surveillance will be deterred from reporting it to the police for fear of being labeled narcissistic or paranoid. Moreover, individuals, such as an abused spouse, will not challenge improper or unconstitutional mental-health evaluations in federal court when it will result in the automatic waiver of his or her federal, common-law psychotherapist-patient privilege. Simon should have *jus tertii* standing to bring the First and Fourth Amendment claims of third parties not before the Court in this case.

The Sixth Circuit did not address Simon's First Amendment arguments asserted in full for the

first time on appeal. Pet. App. B at 24-26. But Count X of the Amended Complaint in this case alleges the Kentucky statutes are vague and overbroad and requests all appropriate injunctive relief. Given the potential for arbitrary enforcement *and* chilled speech, Simon respectfully suggests the Court also consider granting the writ for the second question presented because it is nationally significant, and it is a pure question of constitutional law. *Cf. City of Canton v. Harris*, 489 U.S. 378, 384-86 (1989) (issuing writ when respondents were tardy in objecting to petitioner's failure to preserve precise issue below).

CONCLUSION

For these reasons, Simon respectfully requests that this Court grant certiorari, articulate a more reasonable standard of probable cause favoring the rights of individuals in this context, administer the strong medicine necessary to declare the Kentucky statute null and void *ab initio*, reverse the Sixth Circuit's decision and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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